DATUK TIAH THEE KIAN

v.

PP & OTHER APPEALS

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN MOHD YUNUS J
[CRIMINAL APPEAL NOS: 42-4-2000, 42-5-2000, 42-7-2000, 42-8-2000, 42-9-2000 & 42-10-2000]
27 DECEMBER 2001

CRIMINAL PROCEDURE: *Revision - Inspection of documents under Criminal Procedure Code, s. 51, order made for - Whether ought to be granted*

CRIMINAL PROCEDURE: *Appeal - Appeal to High Court - Appeal against procedural ruling made by subordinate court - Whether possible - Criminal Procedure Code, s. 307(i)*

CRIMINAL PROCEDURE: *Charge - Framing or particulars of - Charge of abetment - Whether charge materially and substantially defective - Criminal Procedure Code, s. 154 - Penal Code, s. 107*

CRIMINAL LAW: *Securities Industry Act 1983 - Sections 87(a), 122(c) - Criminal offence - Abetment - Absence of principal offender - Whether first appellant could not be convicted until principal offender convicted - Whether trial should proceed*

These were appeals against the decision of the sessions judge dismissing the various applications made by the appellants before the sessions court prior to their trial on charges under ss. 87A(a) and 122C(c) of the Securities Industry Act 1983. The appellants had sought the following: (1) that the sessions court issue a summons under s. 51 of the Criminal Procedure Code ('CPC') ordering the investigating officer of the Securities Commission to make available to the appellants five categories of documents so as to enable the appellants or their solicitors to inspect them; (2) that the sessions court order the prosecution to amend the respective charges so as to furnish particulars of the manner of the alleged abetment; and (3) that the trial of the appellants on the charges be stayed until the principal offender was arrested and jointly tried with the appellants before the sessions court.

Held:

[1] In view of the complicated nature of the charges, the complexity of the alleged transactions, the numerous documents involved, and the relevance of the documents to the charges as conceded by the prosecution, the appellants' application for the five categories of documents should be granted. (p 36 h-i)

[2] The decision of the sessions court in rejecting the applications by the appellants seeking an order to compel the prosecution to amend the charges so as to provide particulars as to the manner of the alleged abetment was a mere procedural ruling, and was not appealable to the High Court under s. 307(i) of the CPC. (p 38 e)

[3] As the charges against the first and second appellants were materially and substantially defective, the prosecution was directed to amend the charges so as to furnish adequate particulars as to the manner of the commission of the alleged act of abetment in conformity with s. 154 of the CPC. (pp 40 g & 42 d-e)

[4] The appeals on the third and final issue must be dismissed as clearly the decision of the learned sessions court judge on this issue was also a procedural ruling and therefore not appealable. (p 42 f)

[4a] The appellants would not be prejudiced if the trial were to proceed in the absence of the principal offender for even if the appellants felt strongly about the merit of their argument that the first appellant could not be convicted until the principal offender was convicted, such a point could still be raised at the trial, in submission at the close of the prosecution's case. (p 43 b)

[Appeals allowed in respect of the first issue; appeals dismissed in respect of the second issue, but the order of the sessions court revised; appeals dismissed in respect of the third issue.]

Case(s) referred to:

Hj Abdul Ghani Ishak v. PP [1980] 2 MLJ 196 ***(refd)***
Kulwant v. PP [1986] 2 MLJ 10 ***(refd)***
Lim Gais Khee v. Reg [1959] 25 MLJ 206 ***(refd)***
M Sathaiah v. Rex [1938] 7 MLJ 30 ***(refd)***
Maleb Su v. PP [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 ***(refd)***
Marzuki Mokhtar v. PP [1981] 2 MLJ 155 ***(refd)***
Mohamed Anuardin Abdul Salam & Anor v. PP [1997] 3 CLJ 243 ***(refd)***
Periasamy Sinnappan & Anor v. PP [1996] 3 CLJ 187 ***(refd)***
PP v. Anuar Arshad [1996] 2 SLR 52 ***(refd)***
PP v. Hoo Chang Chwen [1962] 28 MLJ 284 ***(refd)***
PP v. LKI Holidays Leisure Sdn Bhd [1997] 3 CLJ 739 ***(refd)***
PP v. Oh Keng Seng [1979] 2 MLJ 174 ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436 ***(refd)***
PP v. RK Menon & Anor [1978] 2 MLJ 152 ***(refd)***
PP v. Teoh Choon Teck [1963] 29 MLJ 34 ***(refd)***
Syed Abu Bakar Ahmad v. PP [1982] 2 MLJ 186 ***(refd)***
Tennakoon D Harold v. PP [1997] 1 CLJ Supp 392 ***(refd)***
Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 67
Criminal Procedure Code, ss. 51(i), 59, 107(c), 154, 157, 307(1)
Criminal Procedure Code, s. 59
Penal Code, s. 107
Rules of the High Court 1980, O. 24
Securities Industry Act 1983, s. 87A(a), 122C(c)

Criminal Procedure Code [Sing], s. 57(1)

Other source(s) referred to:
Ratanlal and Dhirajlal's Law of Crimes, 23rd edn, p 358

For the 1st appellant - Tan Hock Chuan (Jory Leong & Lai Mun Onn); M/s Tan Hock Chuan & Co
For the 2nd appellant - En Hisyam Teh Poh Teik (Christopher Koh); M/s Teh Poh Teik

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus J:
These are appeals from the decision of the learned Sessions Court Judge, Shah Alam, of 4 April 2000, dismissing the various applications (by notices of application) of the appellants made before the Sessions Court prior to their trial on charges under the Securities Industry Act 1983.

All the six appeals involve three common issues and by consent are consolidated and heard together before me.

Datuk Tiah Thee Kian (hereinafter shall be referred to as the "first appellant") and Ms Khoo Poh Kim (hereinafter shall be referred to as the "second appellant") were charged before the Sessions Court, Shah Alam, on the following charges:

The Charge Against The First Appellant:

Charge

That you between 2 September 1997 to 12 January 1998 at Omega Securities Sdn Bhd, 7th Floor, Plaza Perangsang, Persiaran Perbandaran, 40990 Shah Alam in the state of Selangor Darul Ehsan, directly in connection with the purchase of 35,563,000 units of Uniphoenix Corporation Bhd. shares through the margin accounts in Omega Securities Sdn. Bhd. listed in the Appendix to this charge, abetted Dato' Soh Chee Wen (Identity Card No: 591226-01-5879) in using a scheme to defraud Omega Securities Sdn. Bhd. by the execution of direct business transactions, namely "crossings", in the said margin accounts that did not involve any change in the beneficial ownership of the said Uniphoenix

Corporation Bhd. shares and thereby caused the withdrawal of a sum of RM424,930,597.50 from Omega Securities Sdn. Bhd. when the margin equity of the said margin accounts listed in the Appendix was below 150% in contravention of Rule 20(20) of the Kuala Lumpur Stock Exchange Rules For Trading By Member Companies, and thereby resulting in Omega Securities Sdn. Bhd. not having sufficient collateral in financing the said margin accounts, which offence was committed as a result of your abetment and you have thereby committed an offence under section 87A(a) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280), punishable under section 91 of the same Act.

Appendix

1. Ding Chu Hua	4,650,000 units Uniphoenix Corporation Berhad shares
2. Yaw Kok Ming	4,500,000 units Uniphoenix Corporation Berhad shares
3. Kok Fook Loy	4,500,000 units Uniphoenix Corporation Berhad shares
4. Tai Wah Ventures Sdn. Bhd.	4,000,000 units Uniphoenix Corporation Berhad shares
5. YCS Ventures Sdn. Bhd.	3,500,000 units Uniphoenix Corporation Berhad shares
6. Autoways Development Sdn. Bhd.	2,000,000 units Uniphoenix Corporation Berhad shares
7. Mesra Properties Sdn. Bhd	4,500,000 unit saham Uniphoenix Corporation Berhad.
8. Syabas Dinamik Sdn. Bhd	4,636,000 unit saham Uniphoenix Corporation Berhad.
9. Loy Sai Wee	1,146,000 unit saham Uniphoenix Corporation Berhad
10. Rekairama Sdn. Bhd.	2,131,000 unit saham Uniphoenix Corporation Berhad.

The Charge Against The Second Appellant:

Charge

That you between 2 September 1997 to 12 January 1998 at Omega Securities Sdn. Bhd., 7th Floor, Plaza Perangsang, Persiaran Perbandaran, 40990 Shah Alam in the state of Selangor Darul Ehsan, directly in connection with the purchase of 35,563,000 units of Uniphoenix Corporation Bhd. shares through

the margin accounts in Omega Securities Sdn. Bhd. listed in the Appendix to this charge, abetted Datuk Tiah Thee Kian (Identity Card No: 470901-01-5071) in abetting Dato' Soh Chee Wen (Identity Card No: 591226-01-5879) in using a scheme to defraud Omega Securities Sdn. Bhd. by the execution of direct business transactions, namely "crossings", in the said margin accounts that did not involve any change in the beneficial ownership of the said Uniphoenix Corporation Bhd. shares and thereby caused the withdrawal of a sum of RM424,930,597.50 from Omega Securities Sdn. Bhd. when the margin equity of the said margin accounts listed in the Appendix was below 150% in contravention of Rule 20(20) of the Kuala Lumpur Stock Exchange Rules For Trading By Member Companies, and thereby resulting in Omega Securities Sdn. Bhd. not having sufficient collateral in financing the said margin accounts, which offence was committed as a result of your abetment and you have thereby committed an offence under section 87A(a) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280), punishable under section 91 of the same Act.

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10. Rekairama Sdn. Bhd.	2,131,000 unit saham Uniphoenix Corporation Berhad.

Both appellants were jointly tried before the Sessions Court.

However, prior to the trial, both the appellants made applications before the Sessions Court seeking the following:

(a) That the Sessions Court to issue a summons under s. 51 of the Criminal Procedure Code to order the investigating officer of the Securities Commission to make available to the appellants, at the office of the Securities Commission, five categories of documents so as to enable the appellants or their solicitors to inspect and to make photostat copies of those documents.

(b) That the Sessions Court to order the prosecution to amend the respective charges so as to furnish particulars of the manner of the alleged abetment.

(c) That the trial of the appellants on the charges be stayed until the principal offender, namely, Dato' Soh Chee Wen, is arrested and jointly tried with the appellants before the Sessions Court.

As said earlier, the above applications were dismissed by the learned Sessions Court Judge and this led to the present appeals.

It will be noted from the above charges that the appellants are charged under ss. 87A(a) and 122C(c) of the Securities Industry Act 1983. Section 87A(a) of the Securities Industry Act 1983 provides:

Use of manipulative and deceptive devices.

87A. It shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities-

(a) to use any device, scheme or artifice to defraud;

…

Section 122C(c) of the same Act reads:

Attempts, abetments and conspiracies.

122C. A person who –

(a) …

…

(c) abets or is engaged in a criminal conspiracy to commit (as those terms are defined in the Penal Code) any offence under this Act, whether or not the offence is committed in consequence thereof,

commits such offence and is liable to the penalty for such offence.

I shall now deal with the first issue, namely, whether the Sessions Court was correct in law in refusing to issue a summons under s. 51 of the Criminal Procedure Code to order the investigating officer of the Securities Commission to make available to the appellants, at the office of the Securities Commission, five categories of documents specified in the applications so as to enable the appellants or their solicitors to make photostat copies of those documents. Section 51 of the Criminal Procedure Code reads:

51. Summons to produce document or other things.

(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

The exact nature of the applications and the details of the five categories of documents that the appellants desired to be made available to them for inspection are stated as follows (I shall only refer to the application by the second appellant as an example):

2. Perayu telah memfailkan suatu Notis Permohonan bertarikh 28 Mac 2000 (Lampiran 42) di Mahkamah Sesyen Shah Alam untuk mendapatkan perintah-perintah bahawa:

(i) Suatu Saman dikeluarkan terhadap pegawai penyiasat, Liew Chee Hing, menurut seksyen 51 Kanun Prosedur Jenayah (N.M.B. Bab 6) untuk mengemukakan dokumen-dokumen di bawah yang perlu dan mustahak untuk tujuan perbicaraan Kes Mahkamah Sesyen Shah Alam No: 62-33-99 di mana Pemohon dituduh di bawah seksyen 87A(a) dibaca bersama seksyen 122C(c) Akta Perindustrian Sekuriti 1983 (Akta 280) dan yang dipercayai berada dalam milikan atau di bawah kuasa Responden-Responden dalam tempoh masa 14 hari dari tarikh Saman tersebut pada waktu pejabat di pejabat Suruhanjaya Sekuriti di 3, Persiaran Bukit Kiara, Bukit Kiara 50490 Kuala Lumpur:

(a) nota kontrak atau dokumen serupa yang menunjukkan pembelian 35,563,000 unit saham Uniphoenix Corporation Berhad melalui akaun-akaun margin di Omega Securities Sdn Bhd yang disenaraikan dalam Lampiran bersama kertas pertuduhan Pemohon (selepas ini dirujuk sebagai "akaun-akaun margin yang disenaraikan tersebut");

(b) borang permohonan pembukaan akaun-akaun margin yang disenaraikan tersebut serta dokumen-dokumen sampingan dan/atau sokongan seperti kad specimen tandatangan, surat memberi kuasa ("letter of authorisation".), perjanjian urusniaga kemudahan margin ("margin trading facility agreement"), surat jaminan dan indemnity ("letter of guarantee and indemnity"), surat kuasa wakil ("power of attorney") dan sebagainya;

(c) cek atau suratcara bank untuk pengeluaran RM424,930,597.50 daripada Omega Securities Sdn. Bhd;

(d) penyata-penyata harian akaun margin ("daily margin account statement"), rumusan akaun margin ("margin account summary") dan laporan akaun margin untuk akaun-akaun margin yang disenaraikan tersebut yang menunjukkan paras ekuiti akaun-akaun margin yang disenaraikan tersebut berada di bawah paras ekuiti margin 150% apabila wang sejumlah RM424,930,597.50 dikatakan dikeluarkan daripada Omega Securities Sdn. Bhd; dan

(e) dokumen-dokumen yang menunjukkan keempunyaan 35,563,000 unit saham Uniphoenix Corporation Berhad tersebut sebelum dibeli melalui akaun-akaun margin yang disenaraikan tersebut.

(ii) Pemohon dan/atau peguamcaranya diberi kebenaran untuk memeriksa dan membuat salinan dokumen-dokumen yang dikemukakan oleh pegawai penyiasat, Liew Chee Hing, menurut Saman di perenggan (i) di atas.

To state briefly the nature of the required documents, category (a) refers to the contract notes and any form of documents that will show the alleged purchase of the shares of Uniphoenix Corporation.

Category (b) refers to the application forms submitted to open the alleged 10 margin accounts and related documents such as the cards containing the specimen signatures, margin trading facility agreements, letters of authorisation, letters of indemnity and guarantee and powers of attorney which the margin clients will sign in favour of the stock broking company.

Category (c) refers to cheques and other banking instruments that will show the alleged withdrawal of monies from Omega Securities Sdn. Bhd..

Category (d) refers to three documents, namely, the daily margin account statement, the margin account summary and the margin account report in respect of the accounts listed which show that the margin equity of the 10 margin accounts had (allegedly) gone below 150% when the monies were allegedly withdrawn.

Category (e) refers to documents that will show the ownership of the 35 million shares before the alleged purchase was transacted through the margin accounts.

Encik Tan Hock Chuan and Encik Hisyam Teh Poh Teik, the learned counsels for the first appellant and second appellant, respectively, submit that the learned Sessions Court Judge erred in law in refusing the applications. They contend that the documents are necessary or desirable for the purpose of the trial, considering the complex nature of the charges, the numerous documents involved, and the concession by Encik Yaacob Sam, senior federal counsel, that the prosecution at the trial would be relying on the five categories of documents specified by the appellants in order to prove the charges against the appellants. In support of his contention, learned counsels rely on:

(a) *Public Prosecutor v. Teoh Choon Teck* [1963] 29 MLJ 34

(b) *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 MLJ 196; and

(c) *Public Prosecutor v. Raymond Chia Kim Chwee & Anor.* [1985] 2 MLJ 436.

The learned senior federal counsel Encik Yaacob Sam, and later senior federal counsel Puan Amelia Tee who took over the conduct of the prosecution from Encik Yaacob, on the other hand, argue that the appellants have no right to those documents as the documents are not specified in the charges. It is argued that in order for the appellants to be entitled to inspection of the documents, the documents must be specified in the charges. And it is further argued that if the court were to make the order prayed for that would tantamount to compelling the prosecution to reveal its evidence to the defence before the trial commences. The prosecution cites:

(a) *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1982] 2 MLJ 186;

(b) *Kulwant v. Public Prosecutor* [1986] 2 MLJ 10; and

(c) *Raymond Chia.*

In my judgment, considering the circumstances of the case and based on judicial authorities, there is merit in the applications and the learned Sessions Court Judge, with respect, ought to have granted the applications. It is clear

from the nature of the charges, as I have set out above, that they are not simple, ordinary and straightforward charges and that the case against the appellants is a complicated one involving numerous documentary evidence. Clearly it is not a run of the mill sort of case. The defence is not asking for all the documents but instead has taken the initiative to specify the documents (the five categories) and the prosecution has conceded that at the trial it would be relying on these documents so specified in order to prove its case against the appellants. The defence is not asking for the originals nor is it asking to be supplied with photostat copies of the same. There is no question of the likelihood of the documents being tempered by the appellants as possession of the documents will still be with the prosecution throughout. The appellants are merely asking for the opportunity to be given to their solicitors to inspect the documents at the office of the Securities Commission and, if necessary, the opportunity to make photostat copies of the same. The appellants need these specified documents in order to prepare a proper defence. I fail to see in what way the prosecution would be prejudiced if the applications were to be granted. But I have no doubt whatsoever that the appellants would be seriously handicapped in answering the charges if they are denied the opportunity of inspecting the documents before the trial, since it has been conceded by the prosecution that those documents would be the foundation of the case for the prosecution. And considering the numerous documents involved, it is foreseeable that if these applications are not allowed before trial and that applications for inspection of documents are only supposed to be made during the trial, when the documents are tendered piece by piece by the prosecution before the trial court as the trial progresses, the smooth running of the trial would be seriously hampered and there would be substantial delay as the proceeding would be bogged down by a series of applications for postponement by the defence. That would certainly be detrimental and prejudicial not only to the appellants but to the prosecution as well. Based on all these considerations I think it is necessary or desirable for the purpose of the trial that the applications be granted.

In *Teoh Choon Teck*, Hepworth J, in interpreting s. 59 of the then Criminal Procedure Code (Cap. 21) (which is in *pari materia* with s. 51 of the present Criminal Procedure Code (Cap. 6)), ruled as follows (at p. 35):

> Section 59 of the Criminal Procedure Code reads as follows:
>
> > 59(1) Whenever any Court considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court, it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to the same.

(3) Nothing in this section shall be deemed to affect any provisions of the Evidence Ordinance (Cap. 13) or the Bankers' Books Evidence Ordinance (Cap. 17) or to apply to any book, letter. Postcard, telegram or other document in the custody of the postal or telegraph authorities or of any telegraph company.

The need for this section would appear to be that in criminal cases neither party can obtain evidence from the opposite side by means of interlocutories or discovery of documents. The language of this section is very wide but before issuing a summons under it the court is bound to consider judicially whether the production of the documents is necessary or relevant for the purpose of the inquiry, trial or other proceeding. The thing called for must have some relation to, or connection with, the subject-matter of the investigation or inquiry or throw some light on the proceeding, or supply some link in the chain of evidence. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions. (*Mallal's Criminal Procedure*, 3rd edn, p. 69). It is not a question at that stage of whether the document is admissible or not. It may be that the thing called for may turn out to be wholly irrelevant to the inquiry, but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there. (*Sohoni's Code of Criminal Procedure*, 15th edn, vol. 1. p. 239). The important thing is that at the time it appears to be relevant to the investigation, inquiry, trial or other proceeding."

At a later part of the judgment his lordship went on to say (at p. 36):

The document or thing must be clearly specified, that is, it must indicate the document to be produced and should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial. A general direction to produce all papers relating to the subject in dispute will not be enforced it must be directed at a specific document.

In Ghani Ishak, Wan Yahya J (as he then was) held (at p. 197):

As regards the last category of document applied, ie, documents seized by the B.S.N. in respect of this case, the application is made pursuant to section 51 of the Criminal Procedure Code. The section empowers the court to order the production of documents for the inspection of the opposite party if the court considers such production is necessary or relevant for the purposes of the trial. These documents were seized in the course of the investigation of the case against the applicant and it was submitted to me that they are very relevant to the applicant in preparing his defence. The voluminous documents have been particularly described in the search lists issued by the B.S.N. and counsel limits

his right of inspection to those on the list only. In *Public Prosecutor v. Teoh Choon Teck* Hepworth J. laid down the test for ascertaining what is necessary or relevant for the purpose of the trial as follows:

> The thing called for must have some relation to, or connection with, the subject-matter of the investigation or inquiry or throw some light on the proceeding, or supply some link in the chain of evidence. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions. (*Mallal's Criminal Procedure*, 3rd edition, page 69). It is not a question at that stage of whether the document is admissible or not. It may be that the thing called for may turn out to be wholly irrelevant to the inquiry, but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there. (*Sohoni's Code of Criminal Procedure*, 15th edition, Volume 1, page 239). The important thing is that at the time it appears to be relevant to the investigation, inquiry, trial or other proceeding.

I see no reason to disagree with his lordship's sound guidelines.

> It was argued by Encik Faidz that the judgment of Hepworth J. restricted the applicant to viewing the document only and not to supply certified copies thereof. I agree with his assertion but wish to add that, although section 51 of the Criminal Procedure Code does not place the obligation on the police as in section 76 of the Evidence Act to supply certified copies of the document sought for, the section clearly did not prohibit the applicant from making copies of them himself.

The learned judge's conclusion is noteworthy (at p. 198):

> In conclusion I wish to express that a remarkably higher standard of justice would have been achieved if the parties adopt a more liberal approach towards applications of this kind. Documents produced unexpectedly in court can only result in adjournment and delay in the disposal of a case. An attitude of undue caution in the production of documents necessary for the defence of an accused person may unfairly give rise to the insinuation that the prosecution is resorting to a hide and seek method or reducing the defence into a game of blind man's buff.

In *Raymond Chia* the respondents had been jointly charged in the Sessions Court for the offence of forgery by using dishonestly a letter of credit for the amount of $2.4 million with a number of specified forged documents. The respondents applied for the inspection of the various documents in the possession of the prosecution including the five documents stated in the charge. In the case of the first respondent his application was in general terms. The second respondent applied for copies of all specified and unspecified documents including the cautioned statement and first information report. They

did not indicate under what provisions of the law the orders could be made. The learned President of the Sessions Court did not allow the applications in toto but made an order confined only to the inspection of the documents specifically referred to in the charge and documents removed for the possession of the respondents. The Public Prosecutor appealed to the High Court. The learned judge of the High Court, Mohd Azmi J (as he then was) ([1985] 2 MLJ 63) held that the respondent's applications were not properly made under s. 51(i) of the Criminal Procedure Code and the order of the learned President must be set aside. However he exercised his power of revision and allowed the first part of the order to remain on the ground that the respondents were entitled to further and better particulars of the charge to enable them to prepare their defence and give instructions to their counsel. He therefore ordered that photostat copies of the documents specifically referred to in the charge be supplied by the Public Prosecutor to the respondents. The respondents and the Public Prosecutor in separate notices of motion posed five questions for the opinion of the Supreme Court. For the purpose of the present case, I shall only refer to questions (2) and (3) which are in the following terms:

(2) Does a person accused of an offence before a Subordinate Court have a right to apply for and obtain an order under s. 51 of the Criminal Procedure Code to inspect and take copies of documents in the possession of the respondent in connection with or in respect of such offence?

(3) If the answer to question (2) is in the affirmative, then what are the documents which the accused is entitled to inspect and take copies of?

In its judgment, the Supreme Court said (at p. 439):

> We were urged that the vital factor in this reference is the distinction drawn between what is labeled as the "strict" approach taken by Seah J. (as he then was) in Syed Abu Bakar bin Abmad and the apparent "liberal" approach envisaged in *Mallal's Criminal Procedure* where the author said that "anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions" which approach would (it was urged) seem to have found favour with Hepworth J. in *Public Prosecutor v. Teoh Choon Teck* and Wan Yahya J in *Haji Abdul Ghani v. Public Prosecutor*. We are of the view however that for practical purposes there is really no such distinction. From the language of the section ("necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding") it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under section 5(i) of the Criminal Procedure Code the Court has to consider the justice of the case and at what stage of the proceeding the application is made.

Where the Court is asked to exercise its discretion under section 51 of the Criminal Procedure Code before the commencement of trial the Court must have regard to the provisions of section 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J. in *Public Prosecutor v. Teoh Choon Teck* at page 35 where he said:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification, however, is also stated by the learned Judge in the same page with which we respectfully agree:

> It will be observed that nowhere do section 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

(2) The answer to questions No. 2 and No. 3 is in the affirmative with a qualification, that is, an accused person has a right to apply for a summons under section 51 of the Criminal Procedure Code but the issue of the summons is at the discretion of the Court before which the enquiry or trial is heard or pending. Where the application is made before the commencement of enquiry or trial as a general rule the documents or materials must be documents or materials specified or referred to in the charge. A general demand for unspecified materials or documents should not be entertained. Where the application is made in the course of inquiry or trial the court has to consider the question of relevancy to the issues for adjudication.

It is submitted by the prosecution that the order of the learned Sessions Court judge in disallowing the application is not appealable as the decision is not a final order as it does not finally disposed of the rights of the parties. With respect, there is no merit in this argument in view of the following judgment of the Supreme Court in *Raymond Chia* (at p. 438) which ruled that such an order is a final order and thus appealable:

> The right of a person to ask for a document or other material in a criminal proceeding under section 51 of the Criminal Procedure Code is a right exercisable at the discretion of the Court. Thus a decision or order to issue a summons under section 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under section 307(i) of the Criminal Procedure Code.

It is further contended by the prosecution that the court may make an order under s. 51 only if the documents desired for inspection are specified in the charge. The prosecution relies on the passage in *Teoh Choon Teck* where Hepworth J said (at p. 36):

> As these documents were **specifically referred to in the charges** and as it was essential for the accused to have the originals or photostat copies in order for him properly to prepare his defence, which could not otherwise be prepared, it seems to me that the Public Prosecutor in order to ensure that justice was not only done but seen to be done should not have raised objections, on the particular facts of this case, to the defence being supplied with photostat copies of the letter and the cheque and also any other documents removed from his possession which he required for the furtherance of this defence, for example a letter or letters in the handwriting of the complainant. (emphasis added.)

With respect I do not think that by the above passage Hepworth J is stating any principle of law stipulating that the documents desired for inspection must be specified in the charge. The learned judge here was merely applying the principle of law, which he had enunciated earlier in that judgment, to the facts before him. The actual principle enunciated in that judgment can be found in an earlier part of the judgment that I have alluded to earlier, that is to say, that part of the judgment where his lordship said (to repeat):

> The thing called for must have some relation to, or connection with, the subject-matter of the investigation or inquiry or throw some light on the proceeding, or supply some link in the chain of evidence. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions. (*Mallal's Criminal Procedure*, 3rd edition, page 69). It is not a question at that stage of whether the document is admissible or not. It may be that the thing called for may turn out to be wholly irrelevant to the inquiry, but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there. (*Sohoni's Code of Criminal Procedure*, 15th edition, Volume 1, page 239). The important thing is that at the time it appears to be relevant to the investigation, inquiry, trial or other proceeding.

To my mind, there is nothing in the above *dicta* that prescribes that the documents in question must be specified in the charge before they can be made available for inspection by the defence.

In support of the argument that the documents must be specified in the charge the prosecution also relies on the ruling in *Raymond Chia* where the Supreme Court held (at p. 440):

> Where the application is made before the commencement of enquiry or trial as a general rule the documents or materials must be documents or materials **specified or referred to in the charge**. (emphasis added.)

With respect, I do not agree with such an interpretation of the above ruling. In my view, the above statement by the Supreme Court must be read together with the very next statement of the court that follows, that is:

> A general demand for unspecified materials or documents should not be entertained.

If the two statements are read together and bearing in mind the word "or" after the word "specified" in the phrase "specified or referred to in the charge", the ruling of the Supreme Court, as I understand it to be, is this: the documents desired must be referred to in the charge, but if they are not referred to in the charge then the documents must be specified by the applicants in his application. What the Supreme Court intended to disallow is an application for unspecified documents or an application made in general terms.

However, I concede that the ruling as laid down by the Supreme Court, in particular the phrase "specified or referred to in the charge", is not without some amount of ambiguity: for it may equally be argued that the phrase "in the charge" refers to "specified" as well, meaning that "specified" means specified in the charge. But such an interpretation renders the words "or referred to" superfluous. However, even assuming that I am wrong in my view and taking the hypothesis that by the words "specified or referred to in the charge" what the Supreme Court meant was that the documents must be specified in the charge (as opposed to being specified in the application), still, what is laid down above by the Supreme Court is, in my opinion, only meant to be a general rule. I do not think the Supreme Court intended to lay down a strict or rigid rule that the documents desired to be inspected by the defence must, in every case, be specified in the charge before the application can be granted. To my mind, what is implied by the Supreme Court by saying "as a general rule" is that there could be exceptions to the general rule, meaning that there could be situations where the application for inspection of documents ought to be allowed although the documents are not specified in the charge if the circumstances of the case so merit. And it is my judgment that, in the present case, in view of the complicated nature of the charges, the complexity of the alleged transactions, the numerous documents involved, and the relevance of the documents to the charges as conceded by the prosecution, the situation merits an exception to the general rule.

Now, in *Raymond Chia*, the Supreme Court held (to repeat):

> A general demand for unspecified materials or documents should not be entertained.

In the present case, the applications are not for unspecified documents but for five categories of documents specified in the applications, and the prosecution has conceded that it would be relying on these specified documents at the trial. Thus, there is no breach of the above principle.

And in *Raymond Chia*, the Supreme Court also ruled (at p. 439):

> The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding.

In the instant case, there is no question of the appellants seeking to gain access to the documents before the trial in a manner akin to a pre-trial discovery and inspection of documents as practised in civil proceedings. For one thing, the appellants in the present case, unlike a pre-trial discovery procedure (see O. 24 of the Rules of the High Court 1980), were not asking the Sessions Court to compel the prosecution to list down all the relevant documents in the possession of the prosecution and to serve the list to the appellants. In the instant case, the appellants already have a clear idea what sort of documents they wish to inspect and they have specified the documents in their applications. They have narrowed them down to five categories. Thus, there is also no breach of the above principle.

In *Kulwant* and *Syed Abu Bakar* it was held that by the respective High Courts that s. 51 of the Criminal Procedure Code (*Kulwant* is a decision of the High Court of Singapore and concerned s. 57(1) of the Singapore Criminal Procedure Code which is in *pari materia* with s. 51(1) of the Malaysian Criminal Procedure Code) does not allow an application for inspection of documents before the trial. However, in *Raymond Chia*, it is clearly stated otherwise: an application for inspection of documents may be made before the trial. The Supreme Court clearly laid down as follows (at p. 439):

> From the language of the section *("necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding")* it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. (emphasis added.)

In the light of the above ruling of the Supreme Court, in the context of Malaysian law, *Kulwant* and *Syed Abu Bakar*, which are decisions of the High Courts, can no longer be regarded as valid authorities on the point.

Accordingly, the appeals in respect of the first issue are allowed. The Sessions Court, Shah Alam, is hereby ordered to issue the summons under s. 51 of the Criminal Procedure Code in the manner as prayed for in the applications of the appellants.

I shall now move on to the next issue. The second issue is whether the learned Sessions Court Judge was right when he rejected the appellants' applications seeking the Sessions Court to order the prosecution to amend the charges so as to provide particulars of the alleged abetment.

It is submitted by the prosecution that the decision of the learned Sessions Court Judge on this issue is not appealable under s. 307(i) of the Criminal Procedure Code as the decision is not an order but a mere procedural ruling that does not finally dispose of the rights of the parties.

I accept this submission. In my view the decision of the Sessions Court Judge rejecting the applications by the appellants seeking an order to compel the prosecution to amend the charges so as to provide particulars as to the manner of the alleged abetment is a mere procedural ruling. Mere procedural rulings by the subordinate courts are not appealable to the High Court under s. 307(i) of the Criminal Procedure Code. They are not "judgment, sentence or order" for the purpose of that section. It has been so held by a series of authorities, for example:

(1) *Public Prosecutor v. Hoo Chang Chwen* [1962] 28 MLJ 284;

(2) *Public Prosecutor v. R. K. Menon & Anor.* [1978] 2 MLJ 152;

(3) *Marzuki bin Mokhtar v. Public Prosecutor* [1981] 2 MLJ 155;

(4) *Maleb bin Su v. Public Prosecutor* [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232;

(5) *Mohamed Anuardin bin Abdul Salam & Anor. v. Pendakwa Raya* [1997] 3 CLJ 243;

(6) *Tennakoon D Harold v. Public Prosecutor* [1997] 1 CLJ Supp 392; and

(7) *Raymond Chia.*

In *Raymond Chia* the Supreme Court stated the principle thus (at p. 438):

> With regard to the first question, under section 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case to which he is a party may appeal to the High Court against any such judgment, sentence or order. The word "order" is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See some discussion on this point in *Mohamed Amin Bros. v. Government of India* (AIR [1950] FC 77). The right of a person to ask for a document or other material in a criminal proceeding under section 51 of the Criminal Procedure Code is a right exercisable at the discretion of the Court. Thus a decision or order to issue a summons under section 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under section 307(i) of the Criminal Procedure Code. It is distinguishable from a purely "procedural" ruling as described in *Public Prosecutor v. Hoo Chang Chwen* and *Public Prosecutor v. R.K. Menon.* In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain documents and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with section 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

The sound judicial policy consideration underlying the principle was well explained by Rose CJ in *Hoo Chang Chwen* where his lordship said (at p. 284):

> I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial.

The appellants' counsels insist that the decision by the learned Sessions Court judge on the issue is appealable under s. 307(i). It is argued that the relevant part of the provision merely reads "any judgment, sentence or order" and that the decision of the learned Sessions Court Judge is an "order". And as long as it is an order it should be appealable. It is argued on behalf of the appellants that the court must interpret the section as so worded and that it is improper for the court to restrict the scope of appeal under the provision, in the absence of clear words in the section to that effect, merely through judicial interpretation that confines the meaning of "judgment" or "order" only to a judgment or an order which would finally dispose of the rights of the parties. In support of this argument, the appellants rely on the Court of Appeal case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. With respect, this case cited is of no relevance as it is a civil case that

concerns the interpretation ss. 3 and 67 of the Courts of Judicature Act 1964. Unlike *Raymond Chia* (a judgment of the Supreme Court) and the other cases that I have cited above, *Tycoon Realty* is not a case on the interpretation of s. 307(1) of the Criminal Procedure Code.

Therefore, the appeals on the second issue are also dismissed.

However, this is not the end of the matter in respect of the second issue. For, in the alternative, the appellants are applying to this court to exercise its powers of revision. Looking at the manner the charges are framed, they are, I agree, substantially defective and prejudicial to the appellants. And I am of the firm view that I would be failing in my judicial duty if I do not exercise my powers of revision to rectify the defect. The first appellant is charged for abetting the principal offender, Dato' Soh Chee Wen, to commit an offence under s. 87A(a) of the Securities Industry Act 1983, an offence under s. 122C(c) of the same Act. The second appellant is charged for abetting the first appellant to abet the principal offender (an abetment of an abetment). Section 107 of the Penal Code prescribes the three situations when an act can be said to amount to an abetment. It reads as follows:

> **107. Abetment of a thing.**
>
> A person abets the doing of a thing who –
>
> (a) instigates any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.
>
> Explanation 4 – The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Bearing in mind the above provision of s. 107, the charges against the first and second appellants are materially and substantially defective as they do not contain particulars of the manner of the commission of the alleged abetment. Is the act of alleged abetment in the nature of limb (a) or limb (b) or limb (c) of s. 107; or is it in the nature of any combination of (a), (b) and (c)? The charge must not only particularise but must contain adequate particulars. If the charge of abetment against the first appellant is defective, then the defect in the charge against the second appellant is all the more acute because the second appellant is alleged to abet the first appellant who himself is alleged to commit an act of abetment against the principal offender. Clearly there has been non-compliance with s. 154 of the Criminal Procedure Code which stipulates:

154. When manner of committing offence must be stated.

When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter which he is charged the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

In *Teoh Choon Teck* Hepworth J said (at p. 35):

If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may (*Lim Beh & Ors. v. Opium Farmer* ([1842] 3 Ky. 10]). A charge should be so drawn that the accused should know exactly and with particularity the case which he has to meet and he should not be left guessing as to which of a number of alternatives he is alleged to have offended against. A charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons and crime are insufficient to explain by what means the crime was committed.

Public Prosecutor v. LKI Holidays Leisure Sdn Bhd [1997] 3 CLJ 739, *Public Prosecutor v. Anuar bin Arshad* [1996] 2 SLR 52, *Public Prosecutor v. Oh Keng Seng* [1979] 2 MLJ 174 and *M. Sathaiah v. Rex* [1938] 7 MLJ 30 and several others were also cited by the appellants.

Clearly in the present case both the appellants are left guessing as to the manner in which they are alleged to have abetted the commission of the offence. Clearly they have been prejudiced. This court must intervene. And all the more where it has every opportunity to do so before the trial begins.

Puan Amelia Tee, on behalf of the prosecution, submitted that the charges are proper and that the charges need not furnish particulars of the act alleged to have been committed by the appellants that constitutes the abetment. For her argument she relies on the form of the charge of abetment as set out in item 7 of Form 27 in the Second Schedule of the Criminal Procedure Code and on the form as set out in *Ratanlal and Dhirajlal's Law of Crimes* 23rd edn. p. 358. With respect, the forms in *Ratanlal* and in the Second Schedule of the Criminal Procedure Code are not meant to be authoritative but to serve only as a guide. They should not be followed rigidly but have to be modified accordingly depending on the peculiarity and circumstances of the particular case. The legal status of the form of the charge in *Ratanlal* and the duty of the trial court when faced with a defective charge is well explained by Buttrose J in *Lim Gais Khee v. Reg.* [1959] 25 MLJ 206, 207:

I shall deal firstly with the charge which in my view did not contain sufficient particulars to enable the defendant to know the case he had to meet.

The charge as framed was nothing more in effect than an allegation that the appellant did a negligent act in a negligent manner.

It is true that the charge followed the form set out in *Ratanlal's Law of Crimes* 19th Ed. 785 but these forms are only meant to serve as a general guide and bear no relation to any particular set of facts. Again it is not sufficient, as a general rule, merely to copy out words of the section. The charge must be so framed as to enable the appellant to know with precision and in detail the case against him which he has to meet. It must have particular reference and be adapted to the facts of each particular case. An accused person must not be left in a state of doubt as to the allegations against him or as to which of several alternatives he is alleged to have been guilty of.

It is the duty of the Court to satisfy itself that the charge is on the face of it properly framed before an accused person is called upon to plead to it.

Accordingly, in the exercise of my powers of revision and the powers under s. 157 of the Criminal Procedure Code, the prosecution is directed to amend the charges so as to furnish adequate particulars as to the manner of the commission of the alleged act of abetment in conformity with s. 107 of the Penal Code, and the proposed amendments are to be submitted to this court for approval on 28 June 2001.

The third and final issue is whether the learned Sessions Court Judge was right in rejecting the applications for a stay of the proceedings until the principal offender, Dato' Soh Chee Wen, is arrested and tried jointly with the appellants.

The appeals on this issue must be dismissed as clearly the decision of the learned Sessions Court Judge on this issue is also a procedural ruling and therefore not appealable.

On this issue, I do not propose to exercise my powers of revision. Of course it would be ideal if both the appellants and the principal offender are tried together, but then there is no clear indication from the prosecution as to the likelihood of the principal offender being arrested in the near future and, therefore, to grant a stay would only delay the trial and that would not serve the interests of justice.

The appellants have submitted the reason why there ought to be a stay. It is argued that if the abetment by the first appellant is in the nature of "intentionally aiding" (ie, in the nature of limb (c) of s. 107) then he could not be convicted until the principal offender is convicted. The appellants rely on *Periasamy s/o Sinnappan & Anor. v. Public Prosecutor* [1996] 3 CLJ 187 where Gopal Sri Ram JCA said (at p. 216):

> It is otherwise where the abetment consists of intentional aiding: in such a case, acquittal of the principal offender must result in the acquittal of the abettor.

I do not propose in this judgment to comment on the merit of this argument. At the moment we do not know the nature of the abetment as the charge, as pointed out above, contains a material omission and hence defective. All that I can say for now is that if the trial of the appellants were to proceed in the absence of the principal offender, the appellants would not, in my view, be prejudiced. For, even if the appellants feel strongly about the merit of their argument, such a point can still be raised at the trial, in submission at the close of the case for the prosecution. Indeed, I think that would be the appropriate time to raise such an issue. For by then all parties would have a better appraisal of the case: the charges by then would have been amended in the manner as directed by this court and all parties, including the court, would by then have a clear idea as to the actual nature of the alleged abetment, and the prosecution would have, by then, adduced before the court all the relevant evidence in their possession against the appellants as well as against the absent principal offender.

[Appeals allowed in respect of the first issue; appeals dismissed in respect of the second issue, but the order of the Sessions Court revised; appeals dismissed in respect of the third issue]